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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of:

Spanish Broadcasting System, Inc.
(MegaTV)

Petition for Waiver of Section 73.658(i) of
The Commission's Rules with Respect to
Network Representation

MB Docket No. _____

FILED/ACCEPTED

APR 14 2010

Federal Communications Commission
Office of the Secretary

To: Chief, Media Bureau

PETITION FOR WAIVER

Spanish Broadcasting System, Inc. ("SBS"), by counsel, hereby requests a permanent waiver of Section 73.658(i) of the Commission's Rules (47 C.F.R. § 73.658(i)), known generally as the "Network Representation Rule," for purposes of its operation of the MegaTV television programming network ("MegaTV"). The cited rule generally prohibits an FCC-licensed television station from being represented in the market for national non-network, or "spot," advertising sales by the television network with which it is affiliated, unless the network and the affiliated station in question are commonly owned. The Commission, however, has consistently acted favorably on requests for waiver of the rule sought by foreign-language television networks.

SBS is in the process of assembling a network of affiliates in markets around the country to air MegaTV's programming. Allowing MegaTV the same latitude currently granted on a permanent basis to all of the existing national Spanish language networks will serve the public interest by fostering new entry and competition in the marketplace for Spanish-language

programming, and will maintain a level playing field by ensuring that this new network is subject to the same regulatory requirements as the older networks.

BACKGROUND

1. The Network Representation Rule

The Commission adopted the Network Representation Rule in 1959, at a time when the video programming market as a whole was dominated by the three major English-language programming networks – ABC, CBS and NBC.¹ As the Commission later noted, central to its analysis in adopting the rule was “its observation that network sales and station spot sales were at that time the only competing modes of national television advertising.”² In this limited marketplace, the Commission reasoned that any circumstance that could enhance the ability of the networks to influence prices for national spot advertising charged by local affiliate stations would give them the capability to dominate the national advertising market as a whole, potentially inflating the price of national spot advertising to increase the value of their own advertising inventory.³ Accordingly, as a protective measure, the FCC adopted the rule that remains in place today which precludes a programming network from representing local affiliate stations not co-owned with the network for sale of national spot advertising.

2. The FCC's *De Facto* Policy of Exempting Foreign Language Broadcast Networks from the Network Representation Rule

At the time that the Network Representation Rule was added to the FCC's regulations, the only broadcast networks operating in the United States were English-language networks. It

¹ See *Network Representation of Stations in National Spot Sales*, 27 FCC 697 (1959), *recon. denied*, 28 FCC 447 (1960), *aff'd sub nom. Metropolitan Television Co. v. FCC*, 289 F.2d 874 (D.C. Cir. 1961).

² *Review of the Commission's Regulations Governing Broadcast Television Advertising*, Notice of Proposed Rule Making, 10 FCC Rcd 11853, 11857 (¶ 8) (1995) (“*TV Advertising Rules NPRM*”).

³ See *TV Advertising Rules NPRM*, 10 FCC Rcd at 11857 (¶ 8).

was only many years later that the rule's application to a network that provided programming in a language other than English became an issue for the first time – when the Spanish International Network (“SIN”), which evolved from an advertising rep firm, began selling programming to local broadcast stations in areas with significant Hispanic-American populations. First SIN (which later changed its name to Univision) and then its competitor Telemundo were granted temporary waivers of the rule in 1978 and 1987 respectively.⁴ These rulings were premised on the fledgling status of these networks and intended to encourage their development.

More than a decade after the first temporary waiver of the Network Representation Rule was granted, the FCC made both of the then-operative waivers permanent.⁵ In doing so, the Commission specifically concluded that had it “not waived the network representation rule in 1978, the development of [Univision and Telemundo] would have been hampered, if not stifled completely, an outcome clearly inconsistent with the public interest.”⁶ Moreover, the Commission found that the waivers continued to provide benefits and promote the longstanding Commission goals of “encouraging the growth and development of new networks; fostering foreign language programming; increasing programming diversity, [and] strengthening competition among stations...”⁷

⁴ See *Network Representation of TV Stations in National Spot Sales; Request of Spanish International Network (SIN)*, 43 Fed. Reg. 45,895, 45,898 (¶ 18(b)) (Oct. 4, 1978); *Amendment of §73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales; Request of Spanish International Network (SIN) for Waiver of §73.658(i); Request of Telemundo Group, Inc. for Waiver of §73.658(i); Request of Latin International Network Corporation for Waiver of §73.658(i)*, Report and Order, 5 FCC Rcd 7280, 7282 n.5 (¶ 2 n.5) (1990) (“*Permanent Waiver Order*”) (referencing these waivers, as well as a third granted in 1987 to Latin International Network Corporation).

⁵ See *Permanent Waiver Order*, 5 FCC Rcd at 7281-82 (¶ 12).

⁶ *Id.* at 7281 (¶ 12).

⁷ *Id.* at 7281 (¶ 12).

These same justifications were found persuasive once again in 2003 when Azteca International, an affiliate of Mexico's number two network, TV Azteca, launched operations in the U.S. and also sought a permanent waiver of the rule.⁸ In its decision granting the unopposed request, the Media Bureau quoted verbatim the language cited above from the *Permanent Waiver Order*, and also noted specifically Azteca America's argument that to compete effectively for national spot advertising with stations affiliated with the established Spanish-language networks, the new network must be similarly unconstrained by the Network Representation Rule.⁹

3. SBS's MegaTV Network

MegaTV is a relatively new Spanish-language video programming service launched by SBS several years ago on its flagship station, WSBS-TV, licensed to Key West, Florida. SBS has begun to expand the availability of the network beyond its original base in South Florida. Through creative marketing of the service for delivery via a variety of mechanisms, including terrestrial broadcast stations, HD subchannels, Class A television facilities, and multi-channel video distribution providers, MegaTV hopes to build a nationwide footprint to provide additional choice and competition in the active and highly-competitive U.S. market for Spanish-language video programming. In addition to its commonly-owned over-the-air TV channel, MegaTV has entered into affiliation agreements with other distribution outlets covering an estimated 6.8 million households in the continental United States and Puerto Rico.¹⁰

⁸ See *Azteca International Corp. (Azteca America)*, 18 FCC Rcd 10662 (Med. Bur. 2003).

⁹ See *Azteca America*, 18 FCC Rcd at 10663 (¶ 4).

¹⁰ In addition to the Miami market, MegaTV is currently carried on primary broadcast channels or digital sub-channels in New York, Chicago, Dallas, Orlando, Tampa, West Palm Beach, Charleston, SC, Palm Springs and Fresno. MegaTV is also distributed nationally via DirecTV Mas, and is available in Puerto Rico via broadcast, DirecTV, DISH Network, and all local cable systems.

At the present time, absent the waiver relief it seeks here, MegaTV is at a potential competitive disadvantage vis à vis Univision, Telemundo and Azteca with respect to adding broadcast affiliates because all three of these existing, well-established Spanish-language networks have been granted permanent waivers of the Network Representation Rule.¹¹ SBS seeks the same relief with respect to MegaTV in order to compete effectively with these networks and to ensure it has a fair opportunity to develop and expand its programming service.

DISCUSSION AND REQUEST FOR RELIEF

SBS is requesting a waiver of Section 73.658(i) of the FCC's rules consistent with the *de facto* policy of granting such waivers to Spanish-language networks. Such waivers have been routinely granted by the Commission because they have been deemed to satisfy the general requirement that a waiver of an FCC rule may be granted where good cause is shown and grant of the requested waiver will not undermine the policy served by the rule.¹² In this case, grant of the requested waiver is not only appropriate, but affirmatively necessary, in order to achieve consistency with the regulatory treatment of other similarly-situated networks, to ensure a level playing field in the market for Spanish language networks carried by broadcast stations, and to encourage the development of MegaTV as a new network operating in this marketplace.

¹¹ Currently, the Media Bureau has pending before it a similar request from Liberman Television LLC ("Liberman") concerning Estrella TV, another Spanish-language network. See FCC Public Notice, "Media Bureau Action: Comment Dates Established for Estrella TV Petition for Waive of 47 C.F.R. § 73.658(i), the Network Representation Rule, DA 09-2279, MB Dkt. No. 09-192 (MB, released October 23, 2009). No oppositions or other comments were filed in response to this pending request, for which the pleading cycle closed on December 7, 2009.

¹² See, e.g., *WALT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

1. Grant of the Requested Waiver is Consistent with the FCC's *De Facto* Policy to Waive Section 73.658(i) With Respect to All Spanish-Language Programming Networks.

As detailed above, all of the major Spanish-language programming networks that have broadcast TV station affiliates have obtained, or have sought, a waiver of the Network Representation Rule. These individual waivers have not been limited to a specific period of time, as some FCC waivers have been, and thus do not come up for periodic review and renewal. Instead, the waivers give the recipients the authority to operate on a permanent basis without the constraints of the rule. Taken together, these waivers operate as a *de facto* policy to refrain from applying the Network Representation Rule to networks that offer programming in Spanish.

Maintaining this *de facto* policy at least with respect to those types of networks is particularly appropriate given the fact that the FCC itself has, on several occasions, strongly questioned whether there is a continuing need for the overall policy codified as the Network Representation Rule. As early as 1980, an FCC staff report recommended that the FCC consider repealing the Network Representation Rule.¹³ The proceeding in which that report's recommendations were ultimately considered was terminated by the same Order in which the FCC granted the permanent waivers of the rule to Univision and Telemundo, with the Commission concluding not that the rule clearly continued to benefit the public interest, but simply that the public interest benefits *of its repeal* had not been sufficiently demonstrated to warrant any changes *at that time*, particularly in light of other changes being considered in the

¹³ See FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report*, at 497-499 (October 1980) ("*Network Inquiry Report*").

financial interest and syndication rules, and the Commission's belief that it was "important not to disturb too many facets of the industry at the same time."¹⁴

The Commission again instituted a proceeding to examine the rule in 1995, citing the *Network Inquiry Report's* finding "that the benefits of joint representation to affiliates, networks, and advertisers were likely to outweigh any potential reduction in price competition."¹⁵

Although that proceeding remains unresolved, the general tenor of FCC examination of the Network Representation Rule over the past thirty years has been that the regulation is likely unnecessary, even for the major English-language networks, let alone for nascent, niche networks, such as MegaTV. Accordingly, there is no reason to consider enforcing the rule in this instance, where MegaTV would be less likely to exert harmful influence in the national spot advertising market than any network that has previously obtained or sought a waiver of the rule.

2. Grant of the Requested Waiver Will Ensure a Level Playing Field in the Market for Spanish Language Broadcast Television Programming.

Apart from the legal and policy precedents cited above, as a practical matter, the waiver requested here is affirmatively necessary in order to ensure that the Spanish-language programming marketplace operates fairly, without an undue advantage being afforded to particular networks. Except for the still-pending request concerning Liberman's Estrella TV, each of the established competitors in the marketplace that SBS is targeting with MegaTV is the beneficiary of a permanent waiver of the Network Representation Rule. Accordingly, applying this rule only to MegaTV would subject it to a severe and inequitable competitive disadvantage.

¹⁴ *Permanent Waiver Order*, 5 FCC Rcd at 7281 (¶ 6). See also *id.* ("We do not see from the record a great urgency in the need to change the network spot sales rule, particularly in light of the limited degree of interest shown by two of the networks in expanding their role in the national spot sales market").

¹⁵ *TV Advertising Rules NPRM*, 10 FCC Rcd at 11858 (¶ 9).

In particular, the availability of network sales representation is vitally important for niche networks, such as MegaTV, where traditional rep firms are less likely to have the specific market expertise necessary to adequately represent stations, and to match the most promising advertising leads with stations that are the best fit to reach their target demographic groups. As Liberman Television noted in its recent request for waiver of the rule, “traditional sales firms focus primarily if not exclusively on selling spots during English-language programming and lack the specialized skill and expertise necessary to effectively market Spanish-language stations to advertisers.”¹⁶ For these reasons, as indicated in the 1980 *Network Inquiry Report*, waiver of the rule to allow MegaTV sales representatives to sell national spot advertisements on behalf of affiliated broadcast stations will provide benefits to all participants in the marketplace – advertisers, who will find more outlets for their Spanish-language commercials at reasonable rates; the network, which will be able to offer potential affiliates the added benefit of network representation as its competitors do; affiliates, which will be able to gain the benefits of both high quality network programming and national representation to assist them in attracting a larger share of national spot advertising in their respective markets; and viewers, who will gain access to new and diverse programming.

3. Grant of the Requested Waiver Will Encourage the Development of New Competition in the Spanish-Language Programming Marketplace.

Grant of the requested waiver to SBS will also have the same competitive benefits consistently recognized in the earlier waiver grant proceedings – “encouraging the growth and development of [a] new network...; fostering foreign language programming; increasing

¹⁶ Liberman Television LLC Petition for Waiver, MB Dkt. No. 09-192, at 9 (filed June 29, 2009).

programming diversity; [and] strengthening competition among stations...”¹⁷ Because of the added benefits to affiliated broadcast stations from an established programming supplier assisting in the solicitation and placement of national spot advertising, the availability of this option for SBS in seeking new affiliates for MegaTV will enhance the network’s chances for success, and increase the likelihood that it can grow into a larger and more effective competitor to the older Spanish-language networks. In turn, as the network expands, its capability to produce new and innovative programming to reach and serve discrete portions of the Spanish-language viewing audience will grow. At the same time, the availability of this new programming to local stations will help them increase their audiences and boost their attractiveness as outlets for national advertisers, thereby increasing the level of competition among local stations in the advertising market. Indeed, in considering prior waivers, the Commission has affirmatively concluded that had it failed to waive the Network Representation Rule as to Univision and Telemundo, the “development of new foreign language programming services would have been hampered, if not stifled completely.”¹⁸ For this reason, in order to avoid stifling a new competitive programming service, the FCC should grant the requested waiver expeditiously.

4. Grant of the Requested Waiver Is in the Public Interest.

Measured against the arguments outlined above, including the affirmative benefits of granting the requested waiver, there are no countervailing considerations that could lead to a conclusion other than a finding that grant of a waiver is in the public interest. There is thus good cause to grant the requested waiver. Indeed, failure to grant the waiver would be arbitrary and capricious in light of the extant permanent waivers of the Network Representation Rule. It is

¹⁷ *Permanent Waiver Order*, 5 FCC Red at 7281 (¶ 12).

¹⁸ *Permanent Waiver Order*, 5 FCC Red at 7281 (¶ 12).

well-recognized by the Commission and the Courts that parties that are, as a factual matter, similarly situated must be treated similarly under the law,¹⁹ and consequently that agencies must provide a reasoned explanation, consistent with the Administrative Procedure Act, if they intend to treat similarly situated parties differently.²⁰ There is no basis for treating SBS's MegaTV any differently than any party previously granted a waiver of the Network representation rule because, as a nascent foreign language TV network, it satisfies all relevant criteria previously considered in granting such waivers. Grant of the waiver requested will encourage MegaTV's growth and development, thereby increasing program diversity and competition in this marketplace.

CONCLUSION

SBS respectfully requests that the Commission expeditiously issue a ruling granting it a permanent waiver of Section 73.658(i) of its rules for good cause demonstrated herein.

Respectfully submitted,

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¹⁹ See *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard").

²⁰ See, e.g., *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).